

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 286 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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AJMAL DANUBHAI

Versus

NADODA AJMAL DEJUBHAI

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Appearance:

MS KUSUM M SHAH for Appellants  
None present for Respondent

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 27/08/98

ORAL JUDGMENT

#. Heard the learned counsel for the appellants.

#. This Second Appeal is directed against the judgment of Assistant Judge at Surat in Regular Civil Suit No.114 of 1978 decided on 5.2.81 confirming therein the judgment and decree of the learned Civil Judge (J.D.), Bajana dismissing the suit, being No.72 of 1975, of the plaintiffs-appellants with costs.

#. The facts, in brief, giving rise to the Second Appeal are as under:

The plaintiffs-appellants have instituted a suit inter alia stating therein that they are having agricultural lands Survey No.104 situated in the sim of village Navapura. This Survey No.104 is divided into two portions; southern portion and northern portion. The southern portion falls in the share of plaintiff-appellant No.1 and northern portion in the share of plaintiff-appellant No.2. In the fields of the plaintiffs water from fields above the north comes on the southern boundary of the plaintiffs' fields and towards that side there is a 'Bandh' having five holes and that water is being allowed to go through those holes of that Bandh. Thereafter, the water passes through the said Bandh and enters into the fields of the defendant-respondent. Because of natural level of the land the water flows across the field of the defendant-respondent. Fields in the east and west are situated at the higher level and the fields situated between them are situated at the lower level. The natural flow of water is from north to south. The defendant-respondent had constructed a Bandh of 4 to 5 feet high on his northern boundary and in that way, prevented the flow of natural water from the fields of the plaintiffs through his fields. The plaintiffs-appellants filed a suit with the grievance that the defendant-respondent has no right to prevent the flow of water from the plaintiffs' fields to the defendant's field. Because of this prevention of flow of water, the plaintiffs-appellants' fields become water logged and as a result thereof, it causes damage to the crops. Though at the very inception of starting of the construction by the defendant-respondent, the plaintiffs-appellants have tried to persuade him not to undertake this activity but he has not stopped the same. Prayer has been made for removal of the Bandh of the defendant's field and for injunction restraining the defendant from disturbing the flow of water of the plaintiff's fields across his fields. The learned trial Court dismissed the suit. The Appeal filed by the plaintiffs-appellants has also been dismissed. Hence this Second Appeal before this Court. This Court has, at the time of admission of the Second Appeal, framed two questions for consideration, which are as under:

1. Whether the court below committed an error in interpreting Section 7 of the Indian Easement Act ?

2. Whether for the purpose of getting relief

it was necessary for the plaintiffs to  
join the owner neighbours as parties ?

#. The learned counsel for the appellants fairly conceded that the flow of water of the field of the plaintiffs-appellants through the field of defendant-respondent is no more there since 1975. For this long period, the water of the fields of the plaintiffs-appellants are not flowing and even if the case of the plaintiffs-appellants is accepted, it is not out of the context to say that for this long period of more than 20 years, the plaintiffs-appellants would have found their own way for flow of natural water. The learned trial Court found as a fact from the Panchnama, ex.90 which has been prepared on the very next day of filing of the suit gave out that in the Sim of Village Dhama there is a Bandh of five feet height and breadth east to west on entire northern boundary of the field Survey No.635 of the defendant-respondent. It is further stated in the Panchnama that some portion of the said Bandh on eastern side is broken due to the flow of water. So from ex.90, the learned trial Court has rightly observed that two things come out; that the Bandh was on entire northern boundary of the field of the defendant-respondent and secondly that due to heavy flow of water and force of water portion of the Bandh on eastern side was broken. Relying on this document, the learned trial Court has not committed any error in holding that the say of the plaintiff that the Bandh was made on 1.8.75 by the defendant is not correct. The Panchnama establishes as a fact that there was heavy rain and fields were flooded with rainy water. Ex.82 is another document on which reliance has been placed. From this document, it comes out that the Bandh in the southern side of the field of the plaintiffs is broken for about five feet space and from there water comes out and goes in the field of the defendant-respondent through the road. Reference has been made to document ex.83, the map prepared by the Court Commissioner which clearly reflects the broken Bandh in five feet space on the southern boundary of the plaintiffs' field and broken by 9 feet on the northern side of defendant's field. So the theory as propounded by the plaintiffs-appellants that the water flows from five holes was not accepted. The Appellate Court has confirmed the finding recorded by the trial Court and it is a case where both the Courts below have recorded concurrent findings of fact in which no interference is called for of this Court. The Appellate Court has noticed admission of the plaintiffs-appellants that rainy water from their field passes through the road

and then enters the fields of the defendant. In case the road is situated in between the fields of the plaintiffs and defendant, either at the level lower than that of the plaintiffs' field or at the same level, then the only water can normally flow across the road from the plaintiffs' field to defendant's field. Watchman Bhava specifically says that the road at that juncture of place is at a higher level than that of the field of the parties to the suit. Plaintiffs' own witness Jiva Mohan at ex.108 also admits this position. He further states that the field of the defendant is on higher level. In between their fields there is a road. In view of this situation and location of their fields the water of the plaintiffs' field normally cannot pass in the field of the defendant.

#. So taking into consideration the totality of the facts of this case, the Courts below have have not committed any error in dismissing the suit of the plaintiffs. I do not find any merits in this case. In the result this Second Appeal fails and the same is dismissed. Interim relief, if any, granted by this Court, stands vacated. No order as to costs.

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(sunil)